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MUTUAL ASSENT IN CONTRACT.

The fundamental and distinguishing characteristic of the contractual obligation is that it is based upon the consent of the contracting parties, or, more accurately expressed, it is an obligation which the parties intend and wish to have result from their actions. It is, of course, possible that contract may arise in spite of the wish and intent of one of the parties to the contrary, as, for instance, when an offeror attempts ineffectually to revoke an offer which thereafter ripens into a contract, or where a person's intent is not to contract, but his words or actions reasonably indicate to another a wish to contract with him, and such other appropriately and in good faith acts upon the apparent intention wishing that a contract should arise. In neither of these cases is there really mutual assent. It is true that, in the case of an ineffectual attempt to revoke an offer, the offeror originally intended and wished a contract to arise, but he has changed his mind, and at the time the contract arises he wishes and intends just the contrary. Clearly, this is not mutual assent.

In the case where there is never the intent to contract this is still more evident. Suppose A offers to sell his watch to B, who is very absent-minded. B, with his thoughts engrossed on other matters, hears the offer and mechanically replies "I accept your offer." If A in good faith supposes and understands B to mean what he says, there is surely a contract, and the law cannot concern itself with B's unevinced mental attitude. Yet B had no intent to contract,

and there is no mutual assent, although the situation is such that the law treats their actions as equivalent to such assent.

There must, then, be mutual assent, or, as in the cases stated, actions which the law will treat as taking the place of such mutual assent. It necessarily follows that any justifiable mistake or misunderstanding by the parties as to a material feature of the proposed contract is fatal, because there is neither mutual assent nor conduct which is its equivalent. Thus, where parties were negotiating for the sale of a horse the owner named $160 as the price. They separated and, meeting the next day, the offeree asked, "Did you say $60?" The offeror, understanding that there was doubt only as to the decimal, replied "yes." Supposing the parties to be acting in good faith, there would be no contract, and so the Court held.[1] It is true that the offeree as a reasonable man, is justified in supposing that the offer is $60, because the answer "yes" to such a question would fairly indicate that a man means what he says, but the peculiarity of this case is, that the offeror is, as a reasonable man, fully justified in his supposition that his affirmative reply indicates $160.

If, then, we are to find the equivalent of mutual assent in the action of the parties, although contrary to the intent of one of them, this action must be of such a character as not only to justify the party relying thereon, in the reasonable belief that they indicate assent on the part of the actor, but the situation must involve a further element, namely, that the actor himself ought, as a reasonable man, to know that his actions or words will fairly indicate assent on his part.

These general principles concerning mutual assent are well settled, and easily comprehended, but difficulties may arise in their application. Thus it probably will not be disputed that there is no mutual assent where there exists a justifiable mistake made by one party as to the person with whom he is contracting. If A intends to contract with B, and justifiably supposes he is so doing, but it turns out that the other party is C, there is no contract. Thus in the case of Stoddard *v.* Ham,[2] the plaintiffs supposed that they were

[1] Rupley *v.* Daggett (1874) 74 Ill. 351. [2] (1880) 129 Mass. 383.

contracting with the defendant, although their dealings were with one Leonard, whom they believed to be the agent of Ham. It developed later that Leonard was acting for himself and not as agent. The Court there held that the plaintiff's mistake was not reasonable as matter of fact, and hence that there was a contract with Leonard. But if the situation had justified the mistake there would clearly have been no contract, because the plaintiffs had no intention of contracting with Leonard, that is, with the personality before them, but with a person who was not before them. The mistake, then, was not as to the identity of the person before them, as they had no thought of contracting with him, but with some one else.

When the intent exists on the part of an individual to contract with the personality before him, no mistakes as to qualities or characteristics of that personality can prevent the contract from arising. Thus the erroneous idea that the personality is Rich Smith and not Poor Smith, is a white man and not black, is an agent and not a principal, will not prevent the contract from arising. Suppose that one Poor Pape, of Dayton, Ohio, goes to the establishment of a Boston merchant and introduces himself as Rich Pape, who is a rich man and brother of Poor Pape, the man presenting himself. The merchant, believing that the personality before him is Rich Pape, agrees to send an assignment of goods addressed to Rich Pape at Dayton, Ohio. Poor Pape goes to another merchant in Boston and introduces himself as Poor Pape, but falsely says he is the agent of his brother Rich Pape, and the merchant negotiates with him as agent and agrees to send the goods as in the other case. The goods are sent in each case directed to Rich Pape at Dayton, Ohio, but in some way Poor Pape obtains possession of them from the transportation company on their arrival at Dayton.

In an action of tort to recover the value of the goods, by each merchant against the transportation company, the first merchant should fail because there was an actual contract with Poor Pape, although there was a mistake as to his identity. The merchant intended to contract with the personality before him. Therefore the defendant had delivered the goods to the owner and was justified in so do-

ing. The second merchant has a cause of action, because there was clearly no contract, and hence the defendant company did commit a tort in delivering to Poor Pape, who in that case was not the owner. The merchant did not intend to contract with the personality before him, he was not mistaken in regard to the identity, and, as there was in reality no agency, there could be no contract. This result was reached by the Massachusetts court,[1] and the decision was sound.

But in the case of Cundy *v.* Lindsay,[2] the Court reached a conclusion which seems to the writer to be in conflict with the theory of Edmunds *v.* Transportation Co.[3] One Alfred Blenkarn wrote from London to Lindsay & Co. on the subject of the purchase from them of goods of their manufacture. His letters were written as from "37 Wood Street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood Street on one side, could only be reached from the entrance in 5 Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son carrying on business in Wood Street—but at number 123 Wood Street, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters and sent the goods addressed to "Messrs. Blenkiron & Co., 37 Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way.

The Court held that there was no contract for these goods, and hence no title passed. The Lord Chancellor (Lord Cairns), saying, "They (the jury) have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that

[1] Edmunds *v.* Merchants' Despatch Transportation Co. (1883) 135 Mass. 283. [2] (1878) L. R. 3 A. C. 459. [3] *Supra.*

by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

"If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between them and him there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co., of course, there was no contract, for as to them the matter was entirely unknown, and therefore the pretense of the contract was a failure."

But why was not the mistake of Lindsay & Co. simply as to the identity of the writer and hence similar to Edmunds *v.* Transportation Co.? It was clearly their intention to contract with the writer of the letter, although they were mistaken as to his identity. The letter was not a forgery, although intended to deceive. Suppose Blenkarn had called upon Lindsay & Co., stating that he was of the firm of Blenkiron & Son; surely a contract would have arisen, because they would have intended to contract with

that personality. But if it had happened that Lindsay was locked in his office, consisting of a wooden partition halfway up to the ceiling, with the lock out of order, so that he conversed with Blenkarn over the partition, it could surely make no difference that he failed to see his visitor, but carried on his negotiations by voice separated by an inch of plank. He still intended to contract with the personality with whom he was talking, the body possessing the voice. But suppose that personality had been in an adjoining room fifty feet off, and the conversation had been by telephone; or, further, imagine that both had been skilled telegraphers, and had communicated by operating telegraphic instruments instead of the telephone, how can that change the matter? In each case the intent is to commu nicate with the personality operating the voice, the telephone, the telegraph instrument or the pen that writes the letter. Lindsay & Co. were mistaken as to the identity of the person who wrote the letter, but they certainly did intend to contract with the writer. It seems to me that a contract did arise, and that the Court was not justified in its conclusion.

When there has been such a mistake that no contract arises, it is a self-evident proposition that neither party is bound. Consequently, if one of the parties is mistaken as to a material fact, it is clear that he cannot hold the other party, even though he concludes that it would benefit him to keep to the arrangement in spite of his mistake. Thus, A offers to sell B his horse, meaning a red horse. B supposes W's white horse is intended, and replies that he accepts the offer. B discovers his mistake, but concludes that he would like to have the red horse. If A declines to deliver the red horse, he is certainly not liable, because there never was a contract, and hence neither was ever bound. B cannot decide that he does not mind the mistake, and will, therefore, make it a contract, because the obligation of contract is annexed to the acts of the parties by law and not at the will of the parties. A failure to observe this principle was made by the Illinois court in the case of Maclay *v.* Harvey.[1] That case involved no question of mistake, but nevertheless illustrates the point now

[1] (1878) 90 Ill. 525.

suggested. In that case Harvey had sent Maclay an offer by letter, calling for an answer "by return mail." A proposed acceptance was written promptly, and delivered to a boy for mailing. Through the neglect of the boy the reply was not mailed until two days later.

The Court, with a dissenting opinion, held that there was no contract, but both the majority and minority opinions made the case turn upon a question of waiver. The majority opinion, referring to the delayed reply, said, "Appellee was, therefore, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect." And further down, referring again to the delay, the Court says, "It was incumbent upon her (the plaintiff), before assuming that appellee waived this objection, to ascertain that he in fact did so."

The dissenting opinion, after agreeing that the reply was too late, continues, "The point on which I differ from my brethren is this: I think the evidence tends to show that he did, in fact, *waive* the delay; that he did in fact treat 'the postal card as the consummation of a contract'; that he did regard the contract as closed."

There was no pretense in this case that the delayed reply was accepted as a new offer.

One would suppose that, when the reply was mailed, there either was or was not a contract, and that the law would settle the question; but it would seem from this case that the question of contract or no contract was not settled at that point, was not dependent upon the rules of law, but upon the subsequent desire of the offeror. This seems to be a most surprising result, and very clearly wrong.

The assent of the parties is only one of the initial steps. When the parties have taken the necessary steps, *i. e.*, furnished mutual consent and consideration, it is the law which attaches the obligation; and without each one of these essential steps the obligation is not attached, and there is no such thing as "waiving" by one of the parties, an essential element. The contract either does or does not arise at a given point irrespective of the wishes of the parties, and it is very clear that, in a bilateral contract, both parties are bound at a given point, or neither is; yet the Court, in Maclay *v.* Harvey, seems to think it possible that

one party may or may not be bound, at the whim of the other.

While "mutual assent" is one of the requisites of contract, it merely means that the parties originally desire the obligation of contract to attach to their acts. When once these acts are performed, there does not seem to be any difference in this respect between the obligation of Tort and Contract. In Tort the law annexes to certain actions an obligation, namely, to pay damages. In Contract[1] the law annexes to certain other actions an obligation, namely, contract.

Many of the erroneous notions which exist concerning the doctrines of contract arise from giving too great importance and weight to the feature of consent.

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[1] See Langdell, 1 *Harvard Law Review*, page 56, note 1.